No. 3898

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE WILLS & SONS, LIMITED (a corporation),

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J. SWEENEY, copartners doing business under the firm name of LARZELERE, SWEENEY COMPANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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Statement of the Case.

This is an appeal from a judgment of nonsuit in an action for the alleged breach by defendants in error of a contract for the purchase of onions, the contract being in the words and figures following (Tr. pp. 3, 4):

"San Francisco, California, U. S. A.,
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of 75 (seventy-five) tons of

2240 lbs. Crated Brown Australian Onions at the price of 4 (four) cents U. S. currency per pound, landed on the dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This contract is of course subject to the usual clause exempting us from claims of any nature, through non-fulfillment caused by conditions, over which we have no control.

Yours faithfully,
For George Wills & Sons, Ltd.
A. N. Anderson,
Manager.

Accepted:

Larzelere, Sweeney Co." (Italics ours.)

The onions were delivered to the steamship "Waitotara", at Melbourne, Australia, such delivery being completed on March 7, 1917 (Tr. p. 64). A bill of lading therefor was issued on March 12th (pp. 51-8). The vessel left Melbourne March 16th (p. 45), touched at Sydney, Australia, and Wellington, New Zealand (p. 45), and proceeded to San Francisco by way of Vancouver, British Columbia (p. 12), arriving on May 19th (p. 4). On the arrival of the onions, defendants declined to accept them, and plaintiff sold them at a loss, bringing this action for the difference between the contract price and the sum for which the onions were sold.

At the conclusion of plaintiff's evidence, defendants moved for a nonsuit on three grounds, set forth

at length in the transcript (pp. 70-1). These grounds, briefly stated, are as follows:

1. That the plaintiff failed to ship the onions on board the vessel by March 10, 1917, as called for by the contract.

2. That, as the vessel did not leave Australia until after March 16, 1917, there was no *effective shipment* of the onions, as called for by the contract.

3. That, as the contract called for the delivery of the onions at San Francisco, it affirmatively appeared from plaintiff's evidence that the shipment of the onions by way of Melbourne, Sydney, Wellington and Vancouver, was not a reasonable method of delivery.

While the court, in ruling on the motion, referred particularly to the second ground of nonsuit (pp. 71-2), the order granting the nonsuit was general (p. 73), so that, if any one of the grounds of the motion was valid, the judgment of the lower court must be affirmed. We shall endeavor to show to the court, however, that the motion was good on each of the grounds mentioned.

Argument.

Defendants take the position that they were not bound to accept the onions, on account of breaches of the contract by plaintiff in two respects: first, as to the time of shipment; and, second, as to the manner of delivery. The first two grounds of nonsuit

were directed to the time of shipment, and the third ground of nonsuit was directed to the manner of delivery.

As to the time of shipment, the contract provides for "shipment to be effected by Australia by steamer on the 10th of March, 1917". We contend, first, that the onions were not shown to have been *loaded on board the vessel* by March 10th, and second, that, as the vessel did not leave Melbourne until March 16th, and thereafter touched at Sydney, Australia, more than a day's journey from Melbourne, shipment was not "effected from Australia" until March 18th, at the earliest.

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1. THE EVIDENCE DOES NOT SHOW A "SHIPMENT" OR LOADING ON BOARD BY MARCH 10TH.

The bill of lading is dated March 12, 1917 (p. 58), two days later than the time called for by the contract. The bill of lading is presumptive evidence of the date of shipment:

> *Bowes v. Shand,* L. R. 2 App. Cas. 455, 482;
> *J. Aron & Co. v. Comptoir Wegimont,* 3 K. B. (1921) 435, 438.

In *Bowes v. Shand, supra,* Lord Blackburn said (p. 482):

> "I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading; but *the bill of lading would be strong, and in most cases conclusive evidence, of the date when the shipment was completed.*" (Italics ours.)

In *J. Aron & Co. v. Comptoir Wegimont, supra,* the court expressed a doubt as to the bill of lading being *conclusive* evidence, but held it was *prima facie* evidence of the date of shipment.

Therefore, unless there was other evidence to show an earlier shipment, plaintiff has not brought itself within the requirements of the contract as to "shipment" on March 10th. Plaintiff's answer to this contention may be divided into four heads, each of which we shall demonstrate to be absolutely unsound. Counsel for plaintiff contend:

(1) That the testimony of Mark Shea, showing a delivery to the steamer on March 7th, shows a sufficient shipment under the contract, irrespective of when the goods were put on board the steamer;

(2) That the words "deliver to" necessarily mean "deliver on board" the steamer;

(3) That, if the words "deliver to" do not necessarily mean "deliver on board", on a motion for nonsuit they must be given that meaning; and

(4) That, even if there was no showing of a loading on board within the time provided in the contract, a delay of two days in shipment was immaterial.

In support of its contention that delivery to the steamer is shipment, irrespective of the time of loading, counsel says (Plaintiff's Brief, p. 8) that "goods are shipped when they are delivered to the

carrier for transportation", and cites the following authorities:

Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245;
Clark v. Lindsay, 19 Mont. 1, 47 Pac. 102;
State v. Carson, 147 Iowa 561, 126 N. W. 698, 140 Am. St. Rep. 330;
Schwann v. Clark, 7 Misc. 242, 27 N. Y. S. 262;
Bouvier's Law Dictionary, "Shipment";
1 *Hutchinson on Carrier,* Sec. 113;
Bowes v. Shand, L. R. 2 App. Cas. 455.

Instead of supporting counsel's statements, these authorities cited show conclusively that a shipment on a vessel implies not only a delivery to the vessel, but an *actual loading on board.*

3 *Bouvier's Law Dictionary,* (1914 ed.), p. 3066, defines "shipment" as follows:

> "Shipment. The delivery of the goods within the time required *on* some vessel destined to the particular port which the seller has reason to suppose will sail within a reasonable time. It does not mean a clearance of the vessel as well as *putting the goods on board* where there is nothing to indicate that the seller was expected to exercise any control over the clearance of the vessel or of her subsequent management." (Italics ours.)

In *Ledon v. Havemeyer, supra,* the contract called for "shipment within thirty days", which the court held (121 N. Y. 184) to mean,

> "*putting the goods sold on board* a vessel, bound for New York, with the intent, in good faith,

> to have them cleared for the port of destination in the regular course of trade, or in a reasonable time after shipment". (Italics ours.)

The court quotes with approval from Webster and Worcester, as follows (121 N. Y. 187):

> "Thus, Webster defines 'shipment' to mean: 'The act of *putting anything on board* of a ship or other vessel.' Worcester: 'The act of shipping or *putting on board a ship.*'" (Italics ours.)

In referring to the case of *Bowes v. Shand, supra,* the court again said (121 N. Y. 187):

> "The case was ably and exhaustively discussed by the Lord Chancellor and the Law Lords generally, and the court were unanimously of the opinion that the word 'shipped', according to its natural and ordinary signification, as well as its meaning in the mercantile community, was *the putting of the goods on board the vessel and taking a bill of lading therefor.* (Italics ours.)

Lord Hatherley, in his opinion in the case of *Bowes v. Shand, supra,* said (p. 473):

> "I think the meaning of the word 'shipped' is sufficiently understood by this time in commerce. But if it were needed I think we have sufficient evidence before us that by the word 'shipped' all the witnesses understand *put on board.*" (Italics ours.)

And the Lord Chancellor in the same case said (p. 464):

> "I should say it meant that the shipment must be made, that the rice must be *put on*

board, during two specified months." (Italics ours.)

In the case of *Schwann v. Clark, supra,* where the contract called for October shipment, there was no discussion of the meaning of the terms "shipment", but the goods, according to the opinion, were in fact *placed on board* in October.

It is very doubtful if the cases of *Clark v. Lindsay, supra,* and *State v. Carson, supra,* which relate to land shipments by rail, can have any weight in determining the meaning of the word "shipment" in connection with transportation by water, for the word "shipment", when applied to land transportation, is necessarily used in a secondary or extended sense. Transportation by rail involves delivery to a carrier, running its trains daily or oftener on a regular schedule, and the time between the delivery to the carrier and the loading on the cars is insignificant in such cases. In water transportation, however, ships must be secured for the transportation of the goods, and the buyer protects himself against the uncertainties of the business by providing a definite time of shipment. It may be noted, however, that in the case of *Clark v. Lindsay, supra,* the cattle in question were in fact put on board the cars on the date provided for the shipment, and in *State v. Carson, supra,* the game, which the defendant was accused of having shipped, was removed from the cars. In each case, therefore, there was an actual loading as part of the shipment.

Counsel's citation of 1 *Hutchinson on Carriers,* Sec. 113, is not in point, as the section cited deals only with the question of when the vessel's liability as a common carrier attaches, and does not touch on any question of shipment.

The foregoing authorities, though cited by counsel, demonstrate the correctness of defendants' contention that the *loading of the goods* is an essential element of shipment. We might rest upon these citations, but we refer the court to the following recent cases to the same effect:

Comptoir Commercial Anversois v. Power, Son & Co., 1 K. B. (1920) 868, 885;

J. Aron & Co. v. Comptoir Wegimont, 3 K. B. (1921) 435;

Diamond Alkali Export Corp. v. Fl. Bourgeois, 3 K. B. (1921) 443, 446.

In each of the cases last cited, it is held that shipment means shipment on board.

Perhaps recognizing the weakness of his first contention, counsel quotes (Plaintiff's Brief, p. 13) the testimony of the witness Shea with reference to the delivery of the onions, and on the following pages makes the remarkable pronouncement that

> *"when the witness Shea stated that the onions were delivered to the steamer, he necessarily meant a complete delivery on board the steamer."*

In support of this statement, counsel cites the case of *Baldwin v. Sullivan Timber Co.,* 142 N. Y.

279, 36 N. E. 1060. An examination of that case shows that it in no way bears out counsel's contention. The question there involved was one of demurrage upon a charter of a steamer belonging to plaintiff. The charter party provided that the lay days were to commence when the vessel was ready to receive cargo and had given written notice thereof to the charterer, and further that "should the cargo not be delivered at Pensacola within specified time", certain demurrage would be payable by the charterer, the defendant in the action. Under the charter party the defendant was not only to furnish the cargo, but was also to load and stow it. The delay complained of was not occasioned by any default in delivering the cargo alongside, but was caused by defendant's neglect to load and stow the cargo with diligence. The court very properly held that there was no complete delivery until the cargo was loaded and stowed,

> "because the merchant was still to remain in possession and control of his lumber for the purpose of loading and stowing it." (142 N. Y. 284.)

The case is in no way inconsistent with the definitions of the word "delivery" contained in the other cases and dictionaries cited and quoted by counsel, with which we have no quarrel. They all hold that "delivery" is effected when possession is transferred from one party to the other, which is the accepted sense of the word.

In the case at bar, plaintiff had no duty to load or stow the cargo itself. It was merely to deliver the goods to the steamer and see that they were "shipped"—loaded on board—by March 10th. Of course, one cannot literally "deliver" goods to a steamer, an inanimate object, because such an inanimate object cannot take possession of the goods. One really delivers to the agents or persons in charge of the steamer, and a delivery is made when the goods are placed in the possession of such agent at the dock where the vessel is lying, or when goods in lighters are brought alongside a vessel and taken in charge by the vessel's officers and crew. When they are so taken in charge, the transfer of possession has been effected and the delivery is complete. If the goods are to be loaded by the vessel, as in the case at bar, the delivery is necessarily complete before the loading is done.

In the case of *J. Aron & Co. v. Comptoir Wegimont,* 3 K. B. [1921] 435, goods were delivered to the dock to the ship's agent, but owing to a longshoremen's strike, they were not put on board within the required time. The court there said (p. 438):

> *"Delivery at docks to the agents of a ship for the purpose of future shipment is not the same as an actual shipment on board."*

In that case, as in the case at bar, there was a delivery, but there, as here, there could be no shipment until the goods were on board. Therefore,

when Shea testified that the delivery was completed on March 7th, all that his testimony can be construed to mean is that on that day, plaintiff parted with possession of the onions, and the agents of the steamer took possession of them either on the dock, at ship's tackle or alongside the steamer, for the purpose of afterwards putting them on board. The only evidence of the date of the putting on board is the bill of lading, which is dated March 12th.

There was thus a complete failure on the part of plaintiff to show a shipment before March 12th. Counsel endeavored to supply this gap in plaintiff's evidence by invoking the well known rule that, on a motion for nonsuit, every intendment must be indulged in favor of the truth of the plaintiff's evidence. The cases cited by counsel fully support the rule, but they do not bear out counsel's statement (Plaintiff's Brief, p. 21) that

> "even if the language of the witnesses had *left it in doubt* as to whether the onions were loaded on the vessel before March 10th, *that doubt*, on a motion for nonsuit should have been resolved in favor of the plaintiff."

The question is not one of *doubt,* but one of a presumptive shipment on March 12th, as shown by the bill of lading, and an utter *absence of proof* of an earlier shipment.

It is a matter of common knowledge that the weight, character and destination of particular

parts of any cargo are factors to be taken into consideration in determining when and where on the ship the cargo shall be stowed, and the time or manner of storage in no wise depends on the date of delivery to the ship. It is quite likely that, owing to the well known fact that onions sometimes contaminate other goods placed in their vicinity, the onions were not stowed until the character of the other cargo was determined. This, of course, is conjecture, which we may indulge in in argument, but on the trial plaintiff was called on for proof. The *fact* as to the date of shipment, which may have been on any date from March 7th to March 12th, has not been proved, but what *evidence* there is—the bill of lading—shows a loading on March 12th. For the lower court to have found that the goods were shipped on any other date, it would have had to indulge in conjecture where proof was required. As was said in the case of *Janin v. London and San Francisco Bank,* 92 Cal. 14, 27 (quoted with approval in 38 *Cyc.,* p. 1555, on the question of nonsuit),

> "In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury."

Similarly, in the case of *Samulski v. Menasha Paper Company,* 147 Wis. 285, 292, 133 N. W. 142, 145, it was said:

> "The person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor. He cannot leave the right of the matter to rest in mere conjecture and expect to succeed." (Citing cases.)

Seeking to avoid the effect of the absence of proof of a shipment by March 10th, counsel for plaintiff says that

> "even if the shipment had not been made until March 12th, this slight and unimportant delay would not void the contract." (Plaintiff's Brief, p. 19.)

It is an almost elementary principal of the law of sales that *when the time for performance of a contract of sale is fixed, it is of the essence of the contract and, unless waived by the other party, performance at the time stipulated is indispensible.*

2 *Mechem on Sales,* Sec. 1138;
35 *Cyc.,* 178;
Norrington v. Wright, 115 U. S. 188;
Cleveland Rolling Mills v. Rhodes, 121 U. S. 255;
Bowes v. Shand, L. R. 2 App. Cas. 455.

We do not feel that the court would desire, or expect, us to elaborate the citation of cases on this point, so we shall content ourselves with quoting a

single paragraph from the case of *Norrington v. Wright, supra,* where Mr. Justice Gray said (p. 203):

> "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." (Citing, among other cases, *Bowes v. Shand, supra.*)

The attempt of counsel to distort the case of *Norrington v. Wright* into a support for his statement (Plaintiff's Brief, p. 20), that "a slight and unimportant variation of a day or two was not vital", is almost ludicrous. Aside from the fact that the permissible variation referred to in the case of *Norrington v. Wright* was one in quantity and not in time, the variation was only held to be permissible because of the fact that the contract called for shipments of *about* 1000 tons per month, the very purpose of the use of the words "about" or "more or less" being to allow a margin of variation, thereby avoiding the otherwise strict application of the rule just quoted.

The cases of *Morel v. Stearns,* 37 Misc. 486, 75 N. Y. S. 1082, and *Ingram v. Wackernagel,* 83 Iowa

82, 48 N. W. 998, cited by counsel, in no way depart from the rule announced in *Norrington v. Wright,* In *Morel v. Stearns,* the contract called for May delivery and the goods in question were due to arrive at New York, the port of delivery, on May 29th or May 30th. Both the buyer and the seller's agents had offices in New York, and on May 29th, the seller wrote the buyer a letter, advising him of the expected arrival of the goods and asking him where he desired delivery to be made. Owing to the fact that May 30th was a holiday and the buyer's office was closed, the letter was not answered until May 31st, when the buyer replied by letter, demanding delivery that day. Plaintiff's agents received the letter about noon of the 31st, gave instructions to a forwarding agent for delivery at the place designated, and the goods were delivered the following day, June 1st. It appeared from the evidence that on previous shipments it had been the custom of the seller's agents to advise the buyer of the arrival of the goods, and to deliver them according to instructions then given, the contract being silent as to the place of delivery in New York. The court held that, in view of the fact that the goods were delivered within one day after the receipt of the buyer's instructions, the failure to deliver was due to the fact that the buyer's office was closed on May 30th, and not to any fault of the seller. The sentence in quotation marks, appearing at the bottom of page 20 of Plaintiff's Brief, is not contained in the report of the case, but the following sentence does appear (75 N. Y. S. 1083-4):

> "It is conceded by both parties to the controversy that *a contract of the nature described would require strict performance as to time of delivery* on the part of the vendors."

In the case of *Ingram v. Wackernagel, supra,* the last day provided for delivery fell on a Sunday, and it was held that a delivery on the following Monday was a compliance with the terms of the contract. The fact that the industry of counsel has brought to light no cases supporting his contention that the variation of two days in shipment is immaterial—"slight and unimportant", as he says—demonstrates the universality of the rule of *Norrington v. Wright,* and shows that the judgment of the lower court should be sustained on the first ground of nonsuit urged by defendant.

This brings us to the *second* ground of nonsuit, namely:

2. THERE WAS NO EFFECTIVE SHIPMENT AS REQUIRED BY THE CONTRACT.

Defendants concede that if the contract had called for "shipment March 10th" merely, and the onions had been put on board on that day, the fact that the vessel did not depart from Australia for several days thereafter would not afford a valid reason for refusing to accept them on arrival. As was stated in the definitions of shipment quoted above, a provision for shipment by a certain date requires a departure within a reasonable time thereafter and not a clearance on the date specified. But the contract

in the case at bar calls for something more than "shipment of March 10th." It calls for *"shipment to be effected from Australia* by steamer on the 10th of March, 1917". This language, which is plaintiff's own language, and is therefore to be construed strictly against plaintiff, calls for something more than "shipment". It requires a shipment *"to be effected from Australia"* by the date specified. Unless we are to say that the words "to be effected from Australia" are to be stricken from the contract, they must be given their natural significance, which is that the parties contemplated a shipment and *a departure from Australia* by March 10th, and such was the ruling of Judge Van Fleet, who said (tr. pp. 71, 72):

> "I am very much inclined to the view, under the arguments which have been had, Mr. Harwood, that you have not shown *an effective shipment* of these goods in accordance with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words 'to be effected' in connection with the words used there than to be accomplished."

The goods in question, onions, are of a perishable nature, and a delay of even a day in their transportation on a voyage ordinarily requiring a month for its completion might result in serious loss. The word "effect" is defined by the Standard Dictionary

> "to be the cause or producer of; bring about; *especially, to bring to an issue of full* success; accomplish; achieve; as to *effect* a reform." (Italics ours.)

The word "from" implies a departure or separation (*United States v. La Coste,* 2 Mason 129, 26 Fed. Cas. 826), and the words "effected from" are certainly apt to express the idea which must have been in the minds of the contracting parties, namely, that the onions would *leave Australia* on March 10th, and could reasonably be expected to arrive in about a month's time after that date.

The case at bar is exactly analogous to the case of *Tobias v. Lissberger,* 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509, which involved a contract for iron rails "*for prompt shipment by sail from Europe and for delivery on dock* at the port of New York." In that case, on the day after the contract was signed the rails were loaded on board a steamer at Stettin, Germany, a city forty miles from the sea, on a river which was ice-bound at the time of loading. The ice did not break up for two months, and the vessel departed for New York on the 2d or 3d of April. On the arrival of the goods, the buyer rejected them. The court held that the contract had not been performed by the buyer because the goods had not been promptly shipped, saying (105 N. Y. 411-2):

> "The sole object of prompt shipment was to secure a speedy arrival for delivery in New York. Until then the goods were at plaintiffs' risk, and only then could the defendant's liability attach. Before that event happened there was to be neither transfer of title nor transfer of possession. It is quite unimportant to inquire how it might be as between the master of the vessel and the plaintiffs, or the shipper, one of whom may be assumed to be the owner, and the other, by virtue at least of the bill of lading,

entitled to possession. *In the case before us it is more reasonable to construe the condition of prompt shipment as a precedent to delivery, and so relating to the actual commencement of the voyage that the known unnavigable condition of the river could furnish no excuse for the delay. The defendant was entitled to such timely delivery as would follow an effective shipment; in other words, to an exact performance by the plaintiffs of their contract to ship and deliver, not two things separable in their nature, but two steps to a single end.* That involves not only a purpose to transport, but an expectation that transportation would commence, if not at once, certainly within a reasonable time. Shipment cannot be said to have been made from Europe, when the port selected had no passage-way or outlet. Nor can it be fairly argued even that the iron was shipped 'for delivery in New York', if it was apparent to the shipper that the vessel could not leave the docks where it took in freight. Something more than shipment was bargained for, viz., prompt shipment, and the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow. *Nothing less could have been in the minds of the parties than expedition, or immediate and effective, or beneficial shipment as a step towards delivery.*" (Italics ours.)

So, in the case at bar, the parties used words exactly suited to their intention, requiring a departure not only from Melbourne, but *from Australia* on March 10th, "as an immediate and *effective*, or beneficial shipment, as a step towards delivery." The evidence shows, however, that the steamer, after leaving Melbourne on March 16th, went to Sydney, Australia, over five hundred miles from Melbourne,

a journey which must have postponed the *departure from Australia* at least another two days. It seems to us that, even if the steamer had cleared from Melbourne on March 10th, the touching at Sydney postponed the departure from Australia beyond the stipulated time; for, if the steamer could touch at Sydney, why not call at Newcastle and Brisbane as well? Both ports are on the east coast of Australia, to the north of Melbourne, and more or less on the way to San Francisco, yet a week's time could be consumed in making successive stops at the ports mentioned. The answer to the question is that the length of time for a voyage from any one of these ports to San Francisco is about the same, and if the goods were shipped at and departed from any one of the four ports mentioned on March 10th, thus departing *from Australia,* defendants could calculate, with some reasonable degree of certainty, the time of their arrival at San Francisco. Therefore the contract was drafted to provide for a shipment *"to be effected from Australia* on the 10th day of March."

In addition to its failure to comply with the terms of its contract as to the *time of shipment,* plaintiff failed to live up to its contract in the particulars specified in our *third* ground of nonsuit, namely:

3. PLAINTIFF DID NOT DELIVER, OR ATTEMPT TO DELIVER, THE GOODS IN A REASONABLE MANNER.

The place of delivery of the onions, as provided in the contract, was "landed on the dock, duty paid,

San Francisco". Plaintiff therefore assumed the burden of delivery, and it was incumbent on plaintiff, not only to ship the goods in time, but to choose a method of delivery which would bring them to the buyer within a reasonable time thereafter, the nature of the goods, the course of trade and the distance between the port of shipment and the port of delivery being considered. Under these circumstances, plaintiff shipped the onions on a vessel which sailed from Melbourne to Sydney, thence to Wellington, New Zealand, thence to Vancouver, British Columbia, and finally arrived at San Francisco on May 19th, *seventy days* after the date of shipment provided in the contract, and *sixty-four days* after the date of departure from Melbourne! The time ordinarily consumed in making the trip from Australia to San Francisco by steam is *thirty days.* (Plaintiff's Brief, p. 20.)

It appears in the evidence that at the time the contract was made, Oceanic Steamship Company ran a regular line of steamers, plying on a regular schedule between Australia and San Francisco (p. 50), and that plaintiff endeavored to book space for the onions on that line, but "could not get space" (p. 49). Plaintiff also claims that it was unaware that the "Waitotara" was to go to Vancouver before proceeding to San Francisco, until after the vessel sailed (p. 44). There is no showing in the record of any peril of the sea, stress of weather or other occurrence, which might account for the sixty-four day trip from Melbourne to San Francisco, and the

delay is unexplained, except by the circuitous route travelled.

It is settled law that where the vendor sells goods, undertaking to make delivery at a distant place, the goods are at the vendor's risk until delivered, and the carrier is the vendor's agent:

Benjamin on Sales (7th Am. ed.), Sec. 693;
Tobias v. Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509;
Herring-Hall-Marvin Co. v. Smith, 43 Or. 315, 323, 72 Pac. 704;
Devine v. Edwards, 101 Ill. 138;
L. Greif & Bro. v. Schuman, 82 S. W. 533, 534 (Tex. Civ. App.);
Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co., 54 Pa. Super. Ct. 11.

Any delay, therefore, of the carrier, not attributable to perils of the sea, is chargeable to the shipper as an act of its agent, and the fact that, as between the shipper and the carrier, the carrier reserves the right

> "to deviate from any advertised route and to touch and stay at other ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge), once or oftener, in any order, backwards or forwards,"

as provided in the bill of lading (p. 52), is a matter of no concern to the buyer. While under such a bill of lading, which we believe to be more ingenious in phraseology than efficacious in law (see *Swift &*

Co. v. Furness, Withy & Co., 87 Fed. 345), a vessel might possibly roam about the seven seas at will for years without rendering the carrier liable to the shipper, this license to wander is a matter between plaintiff and its own agent, and in no way compels defendants, who were not parties to the contract of affreightment, to accept goods which have been shipped over the devious route followed by the "Waitotara" in the present case. So, possibly, the inability to get space on the regular line might be urged by plaintiff as an excuse for non-performance by plaintiff, but it cannot be used to compel acceptance by defendants of an unreasonably delayed delivery.

The language quoted by us from *Tobias v. Lissberger,* is particularly apt (105 N. Y. 412):

> "Something more than shipment was bargained for, viz., prompt shipment, and *the delivery was to be within such time as, dangers of the sea only excepted, might reasonably follow.*"

There is no essential difference between shipment on an ice-bound vessel which could not sail on time, and shipment on a vessel which followed the route taken by the "Waitotara", going to Vancouver, nearly a thousand miles to the north of and away from the port of destination, before finally coming to San Francisco. Neither method of procedure tended to produce, or produced, a delivery within a reasonable time.

In the case of *Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co.,* 54 Pa. Super. Ct. 11, plaintiff at

Birmingham, Alabama, contracted to sell to defendant certain steel under a contract providing for shipments "during April and May" and for delivery at Tacony, Pennsylvania, the defendant's place of business. The court said:

> "The agreement to deliver f. o. b. at Tacony did not mean anything less than that the goods were to be delivered to that place during April and May, or at least within a reasonable time thereafter, as the consummation of the contract. The delivery to the carrier did not divest the title of the vendor to the property, nor pass it to the purchaser, under the contract until it reached its destination, and the hazards of transportation were at the risk of the consignor. * * * *The court rightfully took judicial notice of the distance between Birmingham, Alabama, and Tacony, Pennsylvania, and of the time which, by any ordinary means of transportation, would be consumed in sending goods from one point to the other.* The conclusion could not be other, than that eight months was a wholly unreasonable time for such transportation, and *the delay in making the delivery imposed upon the seller the burden of showing that the cause of the delayed delivery was not under his control. No attempt was made to meet this demand, and the court properly entered a nonsuit.*" (Italics ours.)

So, in the case at bar, plaintiff has failed to meet the burden of showing that the delay in making delivery was not its fault or the fault of the carrier, which was its agent. Its only showing is one of delayed shipment and of a circuitous carriage of the goods, which may account for, but cannot excuse, the attempted delivery of the goods at least forty

days later than defendants were reasonably entitled to expect them.

We respectfully submit that the judgment of the lower court should be sustained upon all of the grounds of nonsuit urged by defendants.

Dated, San Francisco,
March 3, 1923.

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